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HAROLD B. WILLEY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 519

WILLIAM G. MEAGHER and INDUSTRIAL DEVELOPMENT,
Petitioners,

vs.

EASTERN IRON and METAL CO., LTD., and H. C. PATTERSON and PATTERSON CONSTRUCTION CO., LTD.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Your petitioners, William G. Meagher and Industrial Development, respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit filed and entered on the 8th day of September, 1955, and which affirmed a judgment of the Supreme Court of the Territory of Hawaii.

OPINIONS BELOW.

The first opinion of the Supreme Court of the Territory of Hawaii, entered April 25, 1952, is reported in 39 Haw. 346 and is printed in the Record (R. 58-77, 78). The second opinion of the Territorial Supreme Court, entered May 29, 1953 is reported in 40 Haw. 195 and is printed in the Record (R. 758-761). The final opinion of the same Court, entered on December 21, 1953, is reported in 40 Haw. 382, and is printed in the Record (R. 793-6). The opinion of the United States Court of Appeals for the Ninth Circuit appears in the Record (R. 820-824), but has not yet been released in the Federal Reporter, Second Series.

JURISDICTION.

The opinion and the judgment of the United States Court of Appeals for the Ninth Circuit were filed and entered on September 8, 1955.

On October 10, 1955, petitioners' petition for a rehearing, filed on October 4, 1955, was denied by order of the same Court.

On October 13, 1955 there was filed and entered an order of the United States Court of Appeals for the Ninth Circuit staying the issuance of the mandate of that Court, provided that a petition for a writ of certiorari was filed with this Honorable Court on or before November 14, 1955.

Jurisdiction to review this case upon a writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Whether or not it is a clear departure from ordinary legal principles for the Supreme Court of the Territory of Hawaii to set aside, disregard and ignore findings of fact by the Circuit Court of Hawaii based upon, and supported by, competent evidence which that trial Court saw and heard.

2. Whether or not the United States Court of Appeals for the Ninth Circuit has the power to reverse a decision of the Supreme Court of the Territory of Hawaii which does clearly depart from ordinary legal principles.

3. Whether or not the Court of Appeals is helpless to prevent the Supreme Court of the Territory from ignoring all of that Court's prior decisions on the question of the weight to be given the findings of fact of the Hawaiian trial Court, when those findings are based on conflicting testimony and are supported by competent and substantial evidence.

STATUTES AND RULES INVOLVED.

"28 U.S.C. §1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

"28 U.S.C. §1293. Final decisions of Puerto Rico and Hawaii Supreme Courts.

The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs. June 25, 1948, c. 646, 62 Stat. 929."

STATEMENT OF THE CASE.

This case was brought to the United States Court of Appeals for the Ninth Circuit in three separate appeals which were consolidated for hearing in that Court. For the convenience of this Court, and because the decision of the Court of Appeals decides these three appeals separately in its one opinion, the facts relating to each of the three appeals will be set forth separately here, although for the purposes of this petition, petitioners' argument will be directed only to the first appeal.

FIRST APPEAL.

This action was begun on October 22, 1948, by the filing of a bill in equity in the Circuit Court of the First Judicial Circuit for the Territory of Hawaii by respondent herein, Eastern Iron and Metal Co. against H. D. Patterson, Patterson Construction Co. Ltd., a Hawaiian corporation, William G. Meagher and Industrial Development, a California co-partnership. The latter two parties are the petitioners herein.

For convenience and unless otherwise noted respondent will be referred to herein as "Eastern", and petitioners as "Meagher", and "Industrial".

The bill in equity sought enforcement against Industrial as the only solvent party to a joint venture with Patterson Construction Co. Ltd., of a written agreement between Eastern and Patterson Construction Co. Ltd., under which the latter, on September 1, 1948 allegedly sold 1500 tons of cast iron scrap at $50 per ton to Eastern (Ex. 1). Of this tonnage, a bill of sale (which Eastern regarded as part of the contract) provided that 900 tons of cast iron scrap were to come from the Waimea Sugar Mill on the Island of Kauai, and the balance of 600 tons of cast iron scrap was to come from the Waianae Sugar Mill on the Island of Oahu (Ex. 1).

On August 1, 1948, a month before the execution of this alleged bill of sale, petitioner Industrial, a California partnership, entered, by oral agreement, into a joint venture with Patterson Construction Co. Ltd., a Hawaiian corporation, for the purpose of buying, preparing and selling certain cast iron scrap at particular locations in the Hawaiian Islands (R. 177, 436-7, 462).

Petitioner Meagher was attorney-in-fact for the partnership with general powers to do its business in the Hawaiian Islands although he had no financial interest in it (R. 199-200, 201).

A hearing was had on the application for injunctive relief, which by stipulation of the parties, was agreed to be a hearing on the merits.

After observing the witnesses and listening to all of the sharply conflicting testimony on the question as to

whether or not petitioners' motion to dismiss should be granted (R. 486, 646, 647, 665, 667) the trial Court, by oral decision (R. 678-688) (later confirmed by findings of fact and interlocutory decree (R. 50-56)), dismissed the petition as to both petitioners.

The trial Court found in effect that Patterson Construction Co. Ltd. had sold the cast iron at Waianae Mill to the joint venture on August 12, 1948, and that the Patterson Construction Co. Ltd. never had had title to the cast iron at Waimea Mill. On the contrary, the Court found that petitioner Industrial owned the Waimea Mill cast iron and that in fact the iron at Waimea was not part of the joint venture at the time petitioner, Industrial, purchased it (R. 53).

The trial Court also found (again on the basis of conflicting oral testimony which the trial Court saw and heard) that (a) Patterson had no authority to bind the joint venture on the later purported "sale" to respondent Eastern; (b) Patterson had made no representations to Eastern that he was acting for the joint venture; (c) Eastern, in dealing with Patterson, did not intend to deal with or rely upon the joint venture; (d) the $35,000.00 paid by Eastern to Patterson Construction Co. Ltd. was *not* to buy the scrap iron previously sold to the joint venture and to Industrial, but, on the contrary, was a payment by Eastern on account of previous sales by Patterson Construction Co. Ltd. to Eastern or was an advance to Reconstruction Company (R. 54).

The trial Court also found that Eastern was *not* an innocent bona fide purchaser of the cast iron in question

here and that the alleged "contract and bill of sale" on which respondent sued here were actually executed by Patterson while he was under duress and were not free and voluntary transactions (R. 54).

On appeal, the Supreme Court of Hawaii disregarded and set aside these findings, substituting its own views of the case and reversed the decree (39 Haw. 346, R. 58-77; see particularly R. 794). The decision on appeal (R. 78) remanded the case for "further proceedings to determine the nature and extent of the appropriate, just and equitable relief to be granted to the petitioner by final decree in its favor consistent with said opinion" (R. 78).

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit under the provisions of 28 U.S.C. §1293. That Court affirmed this judgment of the Supreme Court of Hawaii, holding that even assuming that the Supreme Court of the Territory of Hawaii gave no weight to the opportunity of the trial judge to see and hear the witnesses, and even assuming that prior Hawaiian decisions required that weight be given to that opportunity and to the trial Court's findings, nevertheless, the decision of the Supreme Court of the Territory of Hawaii should be affirmed.

SECOND APPEAL.

Following the decision of the Supreme Court of Hawaii, entered on April 25, 1952, Meagher traveled to Hawaii (R. 727) and there, with his Hawaiian counsel, discovered

new evidence. His motion for new trial based upon this new evidence was (after the United States Court of Appeals for the Ninth Circuit remanded the case to Hawaii to permit him to file such a motion) denied by the Supreme Court of Hawaii (R. 758-761; 40 Haw. 195).

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit under the provisions of 28 U.S.C. §1293. That Court affirmed the order of the Supreme Court of the Territory of Hawaii denying a new trial.

THIRD APPEAL.

When the first appeal was taken to this Court from the first decision of the Supreme Court of Hawaii (R. 58-77), no supersedeas bond was filed and Eastern set the matter for hearing in the trial Court to obtain a judgment carrying out the mandate of the Territorial Supreme Court. Pending this, petitioners moved for new trial as discussed above under "Second Appeal" (R. 773-5).

The trial Court, (not the trial judge who heard the case originally (R. 787)), attempting to comply with the mandate, gave judgment on September 17, 1952, jointly and severally against petitioners Industrial and Meagher, and Patterson, and Patterson Construction Co. Ltd., in favor of Eastern for $35,000 (R. 776, 777) after reciting that "the issue of petitioner's (Eastern's) right to recover the $35,000 from petitioners here is fully determined and no further proceedings are necessary as to this issue" (R. 776).

The decree, however, did reserve the right to hold further proceedings to determine additional relief to respondent.

Petitioners appealed from this decree. The Supreme Court of Hawaii affirmed as to that portion of the decree granting relief in the amount of $35,000 against petitioners (R. 793-796), and reversed as to the second portion of the decree reserving the right to grant respondent further relief (R. 796).

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit under the provisions of 28 U.S.C. §1293. That Court affirmed the decision of the Territorial Supreme Court.

REASONS RELIED ON FOR GRANTING THE WRIT.

1. **The United States Court of Appeals for the Ninth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.**
2. **The United States Court of Appeals for the Ninth Circuit has, by its affirmance, sanctioned such a departure by the Territorial Supreme Court from the accepted and usual course of judicial proceedings as to call for the exercise of this Honorable Court's power of supervision.**

Until this case was decided, the Hawaiian Supreme Court, in an unbroken line of decisions, had agreed that weight must be given the supported findings of trial Courts, even in cases in equity.

The Court of Appeals for the Ninth Circuit has said distinctly in its opinion in this case that if the Hawaiian Supreme Court has not accorded such weight to the trial

Court's findings, nevertheless when the case is appealed to the United States Court of Appeals, there is no manifest error because—and only because—this is the latest expression of the Hawaiian Supreme Court on its procedures, notwithstanding that the Hawaiian Supreme Court's refusal here to attach weight to the supported findings of the trial Court (1) does not profess to override the former decisions and practices of the Hawaiian Supreme Court; (2) later decisions of the same Court follow the old rule; and (3) the actual conduct of the Territorial Supreme Court in this case constituted a departure from the accepted and usual course of judicial proceedings.

1. The rule of manifest error.

In *Waialua Agricultural Co. v. Christian*, 305 U.S. 91, it was held by this Court that the Court of Appeals can only reverse decisions of the Supreme Court of Hawaii that are manifestly erroneous or that constitute "a clear departure from ordinary legal principles".

It is petitioners' contention that manifest error, requiring reversal by the United States Court of Appeal for the Ninth Circuit, *was* committed by the Hawaiian Supreme Court when that Court displaced, without giving them the slightest weight, the supported findings of the trial Court based upon conflicting evidence seen and heard by the trial Court.

2. The Hawaiian authorities.

While it is true that this was an equity case and hence the Territorial Supreme Court had the naked *power* to

upset the findings of the chancellor (*Watumull v. Ettinger,* 39 Haw. 185; *Manufacturers Life Insurance Co. v. von Hamm-Young Co.,* 34 Haw. p. 288, 303; *Robinson v. McWayne,* 35 Haw. 689, 739), nevertheless it is well established that there is a presumption that an equity case, as well as others, has been correctly decided below (*Sumner v. Jones,* 22 Haw. 391, 394), and where the findings rest upon the credibility of witnesses and the weight of oral testimony and the inferences to be drawn therefrom, *great weight* should be given to findings and decisions of the chancellor who tried the case.

Jellings v. Garcia, 29 Haw. 698, 701:

"It has been repeatedly held by this court that when *in an equity suit* an issue of fact is decided upon conflicting testimony, *great weight will be given by this court to the finding of the trial court,* because the latter saw and heard the witnesses and was in a better position to pass upon their credibility and to weigh the evidence than this court is." (29 Haw. at 701.) (Emphasis supplied.)

Hospital v. Wodehouse, 33 Haw. 846, at 857:

"While *an appeal from a decree in equity* brings the entire record up for scrutiny and review, and this court has the power to weigh evidence and make its own findings of fact, it is ever mindful that the *findings of fact in the trial court, where witnesses are under examination and observation and where actions sometimes speak clearer than recorded words, are entitled to great weight and should not be overthrown unless the record is clearly convincing that they are not in accordance with the evidence* and it is not of controlling importance that the trial court may have

> found some facts which could not be sustained by legal evidence in the record. If the record shows the decree to be correct, it will be affirmed on appeal. These principles have long been established and adopted in a long line of cases in this court." (Emphasis supplied.)

In *Robinson v. McWayne,* 35 Haw. 689, 739, it is again emphasized that in equity appeals findings of fact of the circuit Court judges are entitled to great weight, particularly where the evidence is conflicting.

In *Hung Chin Chin v. Fook Hing Tong,* 38 Haw. 616, 624, the Hawaiian Supreme Court said:

> "This court adopts the established rule that issues of fact, the determination of which by the trial court is dependent solely or in a great degree upon the weighing of conflicting testimony and the credibility of witnesses are entitled to great weight on review (citing cases)."

The Court goes on to say that this rule, of course, does not preclude a review of the entire case, with independent findings of fact and rulings, *should the record on review so warrant.*

There is an unbroken line of Hawaiian decisions that it is peculiarly the province of the chancellor, who heard and saw the witnesses testify, to determine the truth of the controversy; and that the trial court's findings of fact in equity cases, based on conflicting testimony, will be given great weight, and will not be disturbed on review "unless clearly against the preponderance of evidence". See for example:

Bank of Hawaii v. Char & Crozier, 40 Haw. 463, decided March 4, 1954;
Chow Tim & Tanabe v. Lopez, 40 Haw. 55, 60;
DeMello v. DeMello, 34 Haw. 922, 933-4;
In re Pedro, 32 Haw. 751, 753 (the findings of the trial court, who saw and heard the witnesses, will generally not be disturbed even though the Supreme Court has the power to review the findings);
Hokkaia v. Kealoa, 30 Haw. 446, 449-50;
Lymer v. Kumalae, 29 Haw. 392, 400;
Nawahie v. Goo Wan Hoy, 26 Haw. 137;
McCandless v. Castle, 25 Haw. 22;
Wilder v. Pinkham, 23 Haw. 571, 572;
DeSouza v. Soares, 22 Haw. 17.

3. The decision of the Hawaiian Supreme Court disregarded all other Hawaiian cases and clearly departed from established legal principles.

No one can read the record in this case without an immediate realization that the decision of the Territorial Supreme Court necessarily rested upon a determination as to which of two, and sometimes three, conflicting stories should be believed. No one can read the record in this case and the decision of the Supreme Court of Hawaii without an immediate realization that the Territorial Supreme Court merely substituted its own belief for that of the chancellor as to who was telling the truth, and that the reviewing Court simply disregarded evidence and well supported findings of fact by the trial Court which did not conform to its belief. This is confirmed by

the final opinion of the Territorial Supreme Court (R. 794).[1]

It is submitted that this complete failure to give heed to the presumption that the case was correctly decided by the chancellor and the complete lack of weight given to the chancellor's evaluation of the oral testimony which he alone had heard, and the complete disregard of his findings, constitute manifest error, requiring reversal. The long line of cited authorities testify to the extreme temerity (noticeably lacking, in the instant matter, in the Supreme Court of Hawaii) of all reviewing Courts to interfere in any way, in cases at law or in equity, with findings of trial Courts based upon competent, substantial and conflicting evidence.

4. The decision of the United States Court of Appeals for the Ninth Circuit effectively repeals litigants' statutory right to appeal from the Hawaiian Supreme Court.

The decision of the United States Court of Appeals for the Ninth Circuit (R. 820-824) quotes from the final opinion of the Territorial Supreme Court the statement by that Court that it "completely reversed" the opinion of the trial Court and the further statement that this was not done "for any error of trial; on the contrary, the reversal pertained to findings of fact and conclusions

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[1] "That decree (referring to the decree of the trial court) was completely reversed by this court. But there is nothing in this court's prior opinion that could be construed as reversing such decree for any error of trial. On the contrary, the reversal pertained to findings of fact and conclusions of law made in the decree after the close of trial. In reversing the decree, *this court displaced those findings and conclusions with ones of its own of contrary import and remanded the cause . . .*" (R. 794.) (Emphasis supplied.)

of law made in the decree after the closing of the trial" (R. 821).

The Court of Appeals then goes on to say that even assuming that the Territorial Supreme Court gave *no* weight to the opportunity of the trial judge to see and hear the witnesses, *"and that prior Hawaiian decisions required it,* we cannot say that the Supreme Court lacks the power to overrule its prior decisions in the local law of procedure." (Emphasis supplied; (R. 822)).

Petitioners urge that such a holding effectively destroys the right of litigants to appeal to the United States Court of Appeals from decisions of the Territorial Supreme Court, a right which is granted to litigants by the law of the United States, 28 U.S.C. §1293.

Such a holding means that any decisions which the Territorial Supreme Court wishes to give, whether consistent with, or contrary to, its own established prior decisions, or "ordinary legal principles", will be upheld by the United States Court of Appeals on the basis of *Waialua Agricultural Company v. Christian,* 305 U.S. 91.

Petitioners recognize of course the rule of the *Waialua* case, supra, but contend that there is still room, consistent with that decision, for the reversal by the United States Court of Appeals of (1) decisions of the Territorial Supreme Court which constitute a clear departure from "ordinary legal principles", (and petitioners reiterate their contention that the decision of the Territorial Supreme Court in this case constitutes such a departure), and (2) decisions of the Territorial Supreme Court in conflict with its own established principles.

Petitioners contend that whether or not the decision of the Territorial Supreme Court in this case was actually a decision involving the "local law of procedure", as the United States Court of Appeals classified it on page 3 of its opinion (R. 802), nevertheless the decision of the Court of Appeals establishes a startling conclusion:—In permitting the Territorial Supreme Court to ignore all of its prior decisions on the question of the weight to be given the trial Court's opportunity of seeing and hearing witnesses, and the weight to be given the findings of fact of a trial Court, (when those findings are supported by competent evidence), it has determined that there is *no decision* of the Territorial Supreme Court that would be *reversed* by the United States Court of Appeals, (except on a constitutional question), despite the continued right of litigants to appeal such decisions to the United States Court of Appeals. In every other instance the decision of the Hawaiian Court would be its "last" utterance and thus a decision on its own "procedure" which would not be assailable. What then becomes of the doctrine of manifest error? Or more important, of the right of appeal?

5. The decision of Hawaiian Supreme Court here does not overrule its prior decisions; it is a clear departure from them.

There is a substantial difference between a "last expression" which simply *disregards* established principles of law, and a "last expression" which formally and for good reason asserts a *change* in the law.

Petitioners urge that in this case the Hawaiian Supreme Court actually did not "overrule its prior decisions in

the local law of procedure", but rather, *disregarded* them in *this* case *only*. The fact that the Territorial Supreme Court did *not* overrule all of its prior decisions is shown by its later holdings (rendered after the decision in this case) that the trial Court's findings of fact in equity cases, based on conflicting testimony, will be given great weight and will not be disturbed on review unless clearly against the preponderance of evidence. See, e.g. *Bank of China v. Char & Crozier,* 40 Haw. 463 decided March 4, 1954, and *Chow Tim & Tanabe v. Lopez,* 40 Haw. 55, 60 (decided after the first opinion of the Hawaiian Supreme Court here).

There has of course been no suggestion by either the Territorial Supreme Court or by respondent that any of the trial Court's findings were either unsupported, or "clearly against the preponderance of the evidence". On the contrary, it is clear that *each* finding of the trial Court is fully supported by competent evidence.

The Territorial Supreme Court *in this case* simply ignored and refused to follow its prior decisions and ignored and refused to follow the perfectly well-settled and universal rule concerning the weight to be given to supported findings of trial Courts.

6. The Court of Appeals' sanction of this clear departure by Hawaiian Supreme Court is so far reaching as to require the exercise of the Supreme Court's power of supervision.

The decision of the Territorial Supreme Court, if it is allowed to stand, constitutes a completely new, and, so far as petitioners are able to ascertain, unique method

(even in equity cases in Hawaii) of deciding appeals from decisions previously made by trial Courts which have the opportunity to see and hear conflicting testimony.

It must be remembered that the decision of the United States Court of Appeals admittedly involves the assumption (previously quoted) that weight was *not* given to the findings and that the Hawaiian decisions actually *required* that such weight be given (R. 822—p. 3 Advance Sheet opinion of United States Court of Appeals).

Both assumptions of the United States Court of Appeals are unquestionably correct. The result of such assumptions when measured against the decision of the United States Court of Appeals is that the Territorial Supreme Court is perfectly free in this, and of course in all future cases, to pay no attention whatever to the findings of the trial Court, and is perfectly free to substitute its own opinion as to which of two conflicting witnesses was telling the truth. This completely changes all theories and practice of modern jurisprudence and, stated in its simplest terms, means that when an appeal is taken to the Supreme Court of Hawaii in an equity case, the decision on the facts will be whatever the Territorial Supreme Court thinks it should be, and the fact that the case has been tried below will mean absolutely nothing. (Indeed, it will scarcely be worth the litigant's costs to have a transcript of record printed since the Territorial Supreme Court will be perfectly free, if the decision of the United States Court of Appeals stands, to ignore whatever portions of that record it wishes, *for that is exactly what happened in this case.*)

The result herein reached means that the Territorial Supreme Court now has the power to make new findings in equity appeals in *all* cases and in *all* circumstances, *without* considering in any way the findings of fact of the trial Court even though those findings are based in each case upon competent and more-than-adequate supporting evidence. It is submitted that this is a power which is not possessed or exercised by any other Appellate Court and is contrary to the accepted and usual course of judicial proceedings.

If the Territorial Supreme Court is to be permitted to disregard all of its former decisions and the established principle in all other jurisdictions, and to add to its power so as to enable it to disregard and attach no weight whatever to the findings and conclusions of the trial Court (even though these findings and conclusions are supported in each case by competent evidence), and if the United States Court of Appeals is powerless, because of this doctrine of "last expression", to require the Territorial Supreme Court to follow, and not depart from, established legal principles, then it is respectfully submitted that the statute permitting appeals from the Territorial Supreme Court to the United States Court of Appeals, practically speaking (and excluding constitutional questions) has been repealed by the decision in this case.

CONCLUSION.

Manifest error having been committed by the Supreme Court of the Territory of Hawaii, and that Court having departed so far from the accepted and usual course of judicial proceedings and from ordinary legal principles, and that manifest error having been affirmed, and that departure having been sanctioned by the United States Court of Appeals for the Ninth Circuit in its decision, it is respectfully submitted that this petition should be granted by this Honorable Court so that the said decision of the United States Court of Appeals for the Ninth Circuit may be reviewed and reversed by this Honorable Court.

Dated, San Francisco, California,
November 11, 1955.

Respectfully submitted,
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CASPAR W. WEINBERGER,
Of Counsel.

(Appendix Follows.)

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Appendix

United States Court of Appeals
for the Ninth Circuit

WILLIAM G. MEAGHER and INDUSTRIAL DEVELOPMENT, *Appellants,* vs. EASTERN IRON AND METAL CO., LTD., and H. C. PATTERSON, and PATTERSON CONSTRUCTION CO., LTD., *Appellees,* and EASTERN IRON AND METAL CO., LTD., *Cross-Appellant,* vs. WILLIAM G. MEAGHER, INDUSTRIAL DEVELOPMENT, and H. C. PATTERSON and PATTERSON CONSTRUCTION CO., LTD., *Cross-Appellee.*	No. 13,556 Sep. 8, 1955

Appeals from the Supreme Court for the Territory of Hawaii.

Before: DENMAN, Chief Judge, and ORR and CHAMBERS, Circuit Judges.

Denman, Chief Judge:

Three appeals were submitted for our consideration.

I. Meagher and Industrial Development, hereafter Meagher, appeal from a decree of the Supreme Court for the Territory of Hawaii. That court reversed a decree of the Circuit Court of the First Judicial Circuit which dis-

missed the petition of Eastern Iron and Metal Co., hereafter Metal Co., for a constructive trust and other equitable relief against Meagher, Patterson Construction Co., Ltd., hereafter Patterson Co., and H. E. Patterson.

The relief sought by Metal Co. was based upon allegations of the fraudulent conduct of Meagher, Patterson and Patterson Co., in disposing of certain scrap iron to other persons, which the Patterson Co. had agreed to sell to Metal Co. Patterson Co. is insolvent and Patterson is alleged to have controlled it in its alleged wrongful conduct.

The Circuit Court, on conflicting testimony, some viva voce, made its findings that none of the charged parties had acted fraudulently and dismissed the petition. The Supreme Court treated the appeal as a trial de novo, which is its admitted power in equity cases, and set aside the Circuit Court's findings of absence of fraud, made its findings of fraud participated in by Meagher, Patterson and Patterson Co. and returned the case to the Circuit Court to determine the damages.

One of the questions before us is whether the Supreme Court had the legal power so to disregard the Circuit Court's findings and substitute its own. This is a question of law upon which the Hawaiian Supreme Court can be reversed only if its decision is "manifestly erroneous," the United States Supreme Court so holding in Waialua Agricultural Co. v. Christian, 305 U.S. 91.

Appellants claim first that it was manifest error for the Hawaiian Supreme Court to overturn the findings of the trial court since the evidence was based on conflicting

testimony. Appellants concede that the Supreme Court had *power* to make new findings on an appeal in equity under Hawaiian practice, but contend that it was manifest error to overturn the findings without giving due deference and weight to the trial court's opportunity to see and hear witnesses. The opinion of the Supreme Court contains no reference to the trial court's findings and in a later opinion, hereafter considered, the early opinion is explained as follows: "That decree was completely reversed by this court. But there is nothing in this court's prior opinion that could be construed as reversing such decree for any error of trial. On the contrary, the reversal pertained to findings of fact and conclusions of law made in the decree after the close of trial." This does not establish that the court gave *no* weight to the opportunity of the trial judge to see and hear witnesses, nor can we assume it did give it full weight in reversing.

Even assuming that such weight was not given and that prior Hawaiian decisions required it, we cannot say that the Supreme Court lacks the power to overrule its prior decisions in the local law of procedure.

There is no merit in appellants' contention that Federal Rule 52(a) is here relevant. The Federal Rules of Civil Procedure govern only United States District Courts. F.R.C.P. 1. They do not apply to the Hawaiian Territorial Courts and have not been made applicable to appeals to the Supreme Court of Hawaii by its legislature. Fong v. Glover, 197 F.2d 710 holds no more than that the rules apply as to the method of taking an appeal *from* the Hawaiian Supreme Court *to* this Court. We affirm the decision in this appeal.

II. Meagher and Industrial Development appeal from an order of the Supreme Court, denying their motion for a new trial by that Court upon which it would take further evidence, or remand the case to the Circuit Court for that purpose, on the ground of newly discovered evidence.

Part of the claimed newly discovered evidence is stated in an affidavit of Patterson, who testified at the trial that he had participated in the fraud on Metal Co. In the affidavit Patterson denied that any fraud had been perpetrated on Metal Co. He claimed he and Metal Co. had committed fraud upon Meagher and Industrial Development Co., which he concealed at the trial in the Circuit Court, which fraud would tend to show that Meagher and the Development Co. were not liable for the judgment against them.

The Supreme Court held that it would not believe Patterson's statements of his second fraud and denied consideration of this affidavit. We can see no manifest error of the Supreme Court in so acting.

The other claimed newly discovered evidence is the affidavit of one Levinson to the effect that he heard Caplan, Hawaiian agent of Metal Co., say to Rosenthal, its president, that there were not 1,500 tons of scrap iron in the entire Hawaiian Islands, thus tending to show that Metal Co. was not defrauded. Caplan declined to sign an affidavit embodying what Levinson claimed he heard him say. Levinson's alleged interview with Caplan was on August 22, 1952. Four years before at the trial of the case in the Circuit Court Caplan was examined and cross-examined at length as to the amount of scrap on the Hawaiian Islands and described actual scrap transactions exceeding the 1,500

tons. We can find no abuse of discretion, much less manifest error, in the refusal of the Supreme Court to consider this hearsay affidavit as warranting a new trial.

The appeal from the order denying a new trial is affirmed.

III. (a) Metal Co. appeals from a decree of the Supreme Court refusing it further relief above the $35,000 judgment in its favor.

In reversing the Circuit Court the Supreme Court returned the case to the Circuit Court to determine the amount of damage Metal Co. had sustained. Metal Co. moved for a partial decree for the $35,000 reserving the right at later proceedings to claim additional monetary damages and relief and the Circuit Court so acted.

Meagher, Patterson, Patterson Co. and Industrial Development appealed and the Supreme Court sustained the judgment for $35,000 but held that Metal Co. was entitled to no further relief.

Metal Co. contends that the Supreme Court's remanding order permitted the ascertainment of additional damages. The Supreme Court's opinion analyzed the proceedings up to the remand and its mandate and held the latter entitled Metal Co. to the $35,000 and that the Circuit Court had no power to entertain further proceedings. We cannot say that there is manifest error in the Supreme Court's interpretation of its mandate and affirm the judgment in this appeal.

(b) Meagher and Industrial Development appeal from the second decree of the Supreme Court affirming the decision of the Circuit Court on its remanded hearing

awarding to Metal Co. damages against them. It contends that the original trial was not on the merits of the question of damages and hence the trial on remand had the same character.

This contention is contrary to the stipulation of appellants, whose counsel stated:

> "We would have no objection to the Court entering *its final decree* and the Court incorporating in that decree a finding that the respondents are entitled to damages on the injunction bond but leaving the actual computation and assessment of those damages until the case had been remanded from the Supreme Court; and if the appeal is unsuccessful, the damages would then be determined. [Emphasis added.]"

This stipulation was concurred in by Eastern and accepted by the court, the decree, while a final determination of the case on the merits, being denominated "interlocutory" because of this reservation of jurisdiction.

Appellants' understanding that the trial was on the merits is further shown by the following statement made by its own counsel at the trial:

> "Mr. Russell: As I understand it, the decree, as finally drawn, will incorporate in it the dissolution of the temporary injunction *as well as the determination of the case on its merits.*
> "The Court: Yes • • • [Emphasis added.]"

That this was the understanding of Eastern as well is shown by the following statement from the transcript:

> "Mr. Berman (co-counsel for Eastern at the trial): In other words, this is being treated in the eyes of the Court as an actual hearing on the merits?

"The Court: Yes. As well as on the motion. That was all gone into."

The decision of the Supreme Court is affirmed in this appeal.

(Endorsed:) Opinion. Filed Sep. 8, 1955.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

WILLIAM G. MEAGHER and INDUSTRIAL DEVELOPMENT, *Appellants,* vs. EASTERN IRON AND METAL CO., LTD., and H. C. PATTERSON, and PATTERSON CONSTRUCTION CO., LTD., *Appellees,* and EASTERN IRON AND METAL CO., LTD., *Cross-Appellant,* vs. WILLIAM G. MEAGHER, INDUSTRIAL DEVELOPMENT, and H. C. PATTERSON and PATTERSON CONSTRUCTION CO., LTD., *Cross-Appellee.*	No. 13,556

JUDGMENT

Appeals from the Supreme Court for the Territory of Hawaii.

This cause came on to be heard on the Transcript of the Record from the Supreme Court for the Territory of Hawaii, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the said Supreme Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment.

Filed and entered: September 8, 1955.

Paul P. O'Brien, Clerk.